BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-128
	)	
	)	

COMMENTS OF BELLSOUTH TELECOMMUNICATIONS, INC., SBC COMMUNICATIONS INC., AND THE VERIZON TELEPHONE COMPANIES ON INDEPENDENT PAYPHONE ASSOCIATION OF NEW YORK'S PETITION FOR AN ORDER OF PREEMPTION AND DECLARATORY RULING

INTRODUCTION AND SUMMARY

On December 29, 1999, the Independent Payphone Association of New York, Inc. ("IPANY") filed a petition with the New York Public Service Commission ("PSC"), challenging the payphone service rates charged by New York Telephone (now Verizon) and seeking refunds. On October 12, 2000, the PSC rejected IPANY's challenge, holding that Verizon's rates complied with federal requirements. In September 2001, the PSC reaffirmed that holding by rejecting IPANY's petition for rehearing. IPANY then petitioned for state court review of the PSC order.

On review, the state Supreme Court (the trial court) rejected the PSC's holding in part. Verizon and IPANY both appealed. The Appellate Division acknowledged "[t]he fact that the PSC's prior approval of the preexisting rates has now been judicially called into question and the matter has been remanded for further consideration," but held that this "*cannot be the basis of potential refunds*." *Independent Payphone Ass'n of New York, Inc. v. Public Serv. Comm'n*, 774 N.Y.S.2d 197, 200 (App. Div. 2004) ("*IPANY*") (emphasis added). The court thus held that

IPANY's "request for said refund [is] denied." *Id.* That decision is now final and unappealable – as IPANY concedes.

IPANY nevertheless seeks to have this Commission overturn the decision of the New York courts and declare that IPANY is, after all, entitled to refunds. But the Commission cannot "arrogate to itself the power to (a) review or (b) ignore the judgments of the courts." *Town of Deerfield v. FCC*, 992 F.2d 420, 430 (2d Cir. 1993). The New York court's determination that IPANY's members have no claim to refunds is res judicata. Even if IPANY had otherwise properly invoked this Commission's declaratory ruling authority (it has not), and even if IPANY's arguments had merit (they do not), its petition would still constitute an impermissible collateral attack on a binding judgment and must be denied for that reason alone.

I. The prior state court judgment bars IPANY's petition both as a matter of res judicata (claim preclusion) and issue preclusion (collateral estoppel). The state court had jurisdiction, and the very claims IPANY seeks to raise before the Commission were decided by the state court. IPANY therefore cannot mount a collateral attack on that state court judgment. IPANY's argument that the state court judgment is "preempted" by federal law does not affect this conclusion because IPANY already raised its preemption claims in state court. There is no basis for this Commission to deny the state court judgment preclusive effect, and IPANY offers none.

II. Even setting this fundamental defect to one side, IPANY's petition does not properly invoke this Commission's declaratory ruling authority, for all the reasons that we have already set out in our comments on earlier petitions filed in this docket by the Illinois Public

Telecommunications Association ("IPTA") and the Southern Public Communication Association ("SPCA").[1]

III. On the basic issue presented, IPANY's petition is without merit in any event. Before the state court, IPANY conceded that state law filed rate principles barred its claim for refunds, arguing instead that Verizon had voluntarily agreed to provide refunds back to April 15, 1997, in the event that its rates were eventually found to be unlawful. As we have explained before, that claim is incorrect: Verizon merely agreed to provide a refund covering a period of 34 days in the event that it availed itself of a limited waiver allowing it to file compliant tariffs by May 19, 1997. That limited commitment was never implicated here.

As for IPANY's claim that the state court erred regarding the application of the *Wisconsin Bureau Order*[2] and the *Wisconsin Order*,[3] that issue is moot in light of the state court's ruling on refunds, as IPANY has recognized. The PSC is currently reviewing Verizon's current rates in light of the requirements articulated in the 2002 *Wisconsin Order*, and there is accordingly no concrete controversy presented by this aspect of IPANY's petition.

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[1] *See* Comments of BellSouth Telecommunications, Inc., SBC Communications Inc., and the Verizon Telephone Companies on Southern Public Communication Association's Petition for a Declaratory Ruling, CC Docket No. 96-128 (FCC filed Dec. 10, 2004); Comments of BellSouth Telecommunications, Inc., SBC Communications Inc., and the Verizon Telephone Companies on Illinois Public Telecommunications Association's Petition for a Declaratory Ruling, CC Docket No. 96-128 (FCC filed Aug. 26, 2004); Reply Comments of BellSouth Telecommunications, Inc., SBC Communications Inc., and the Verizon Telephone Companies on Illinois Public Telecommunications Association's Petition for a Declaratory Ruling, CC Docket No. 96-128 (FCC filed Sept. 7, 2004). Copies of each of these sets of comments previously filed are also attached hereto as Exhibits A-C, respectively.

[2] Order, *Wisconsin Public Service Commission; Order Directing Filings*, 15 FCC Rcd 9978 (CCB 2000) ("*Wisconsin Bureau Order*").

[3] Memorandum Opinion and Order, *Wisconsin Public Service Commission; Order Directing Filings*, 17 FCC Rcd 2051 (2002) ("*Wisconsin Order*"), *aff'd*, *New England Pub. Communications Council, Inc. v. FCC*, 334 F.3d 69 (D.C. Cir. 2003).

BACKGROUND

IPANY's petition for declaratory ruling involves two of Verizon's permanent service rates, those for Public Access Lines ("PALs") – the basic "dumb" line used in conjunction with "smart" payphones – and usage rates. Under the New York Public Service Law, "permanent" rates are not subject to refund, either by the PSC or by a reviewing court. Any finding that permanent rates are unreasonable can be given only prospective effect. *See Purcell v. New York Cent. R.R.*, 197 N.E. 182, 183 (N.Y. 1935); *Concord Assocs., L.P. v. Public Serv. Comm'n*, 754 N.Y.S.2d 93, 95 (App. Div. 2003).

1. Following the release of the *Payphone Orders* in 1996, the PSC instituted a proceeding in which it directed Verizon and other LECs in New York to file any tariff revisions that would be necessary to comply with the *Payphone Orders*, with such revisions to take effect on April 15, 1997. Verizon concluded that while certain changes to its payphone tariffs were necessary to comply with that order – for example, filing new rates for smart-line service – no changes were required to its existing PAL rates. The PSC, in an order issued on March 31, 1997, recognized that Verizon's PAL service "will continue to be offered as at present" and noted that "rates for grandfathered PAL services now used by [independent PSPs] are not affected" by the revisions to Verizon's tariff.[4]

In April 1997, the Common Carrier Bureau released two orders clarifying the scope of the Commission's "new services test" requirement for payphone services, and granted a limited

[4] Order Approving Tariff on a Temporary Basis, *Proceeding on Motion of the Commission to Review Regulation of Coin Telephone Services Under Revised Federal Regulations Adopted Pursuant to the Telecommunications Act of 1996,* Case No. 96-C-1174 (N.Y. PSC Mar. 31, 1997).

waiver until May 19, 1997 for carriers to file additional revisions to payphone tariffs.[5] The Bureau likewise recognized that carriers that took advantage of that limited waiver would hold customers harmless by making any rate decreases made pursuant to that limited waiver retroactive to April 15, 1997.[6] In response to the Bureau's orders, Verizon informed the PSC that its existing PAL rates complied with the new services test and filed, on May 19, 1997, revisions for only two optional features that are not at issue here.[7]

On July 30, 1997, the PSC sought comment regarding the impact of section 276 and the *Payphone Orders* on specific aspects of its payphone policy.[8] The notice did not seek comment on Verizon's PAL rates. Nevertheless, in response, IPANY filed comments arguing that PAL lines should be "treated as forms of unbundled network elements."[9] IPANY did not, however, ask for refunds of amounts paid under existing rates; it did not refer to the Bureau's April 1997 orders; and it did not object to Verizon's existing usage rates at all. While the PSC took action

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[5] Memorandum Opinion and Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 12 FCC Rcd 20997 (CCB 1997); Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 12 FCC Rcd 21370 (CCB 1997) ("*Second Bureau Waiver Order*").

[6] *See Second Bureau Waiver Order*, 12 FCC Rcd at 21376, ¶ 14, 21379-80, ¶ 20 (requiring reimbursement only for BOCs that "seek[] to rely on the waiver" and only "in situations where the newly tariffed rates are lower than the existing tariffed rates").

[7] *See* Letter from Robert P. Slevin, Counsel for New York Telephone, to Honorable John Crary, Secretary for the New York Public Service Commission, Case No. 96-C-1174 (May 19, 1997).

[8] *See* Notice Requesting Comments Addressing Aspects of the Federal Payphone Regulations, the Need for Changes to the Commission's COCOT Regulations and Certain LEC Payphone Tariffs, *Proceeding on Motion of the Commission to Review Regulation of Coin Telephone Services Under Revised Federal Regulations Adopted Pursuant to the Telecommunications Act of 1996*, Case No. 96-C-1174 (N.Y. PSC July 30, 1997).

[9] Comments of IPANY, *Proceeding on Motion of the Commission to Review Regulation of Coin Telephone Services Under Revised Federal Regulations Adopted Pursuant to the Telecommunications Act of 1996*, Case No. 96-C-1174, at 7 (N.Y. PSC filed Sept. 30, 1997) (IPANY Petition, Exh. B).

with regard to issues upon which it had sought comment, it did not take any action with regard to PAL or usage rates.

2. IPANY took no additional action with regard to its claim that PAL rates should be repriced until December 1999, more than two years later. At that time, it filed a petition with the PSC arguing that Verizon's PAL rates were not new-services-test-compliant, and arguing that PAL rates should be set at TELRIC. IPANY also asked for refunds of PAL charges, but not usage charges.[10] In response, Verizon filed comments to show that existing PAL rates complied with the new services test, and explained that there was no legal basis for any refund of permanent PAL rates in any event.[11]

In March 2000, the Common Carrier Bureau issued its *Wisconsin Bureau Order*, requiring four Wisconsin LECs to file cost data to demonstrate that their existing state tariffs complied with the new services test – an issue that the Wisconsin PSC had declined to address. In that order, the Bureau articulated its own understanding of what the new services test required in this context. IPANY brought the order to the attention of the PSC; Verizon argued that the order was not legally binding on the PSC, was incorrect, and should not be followed.

3. In October 2000, the PSC issued its "Order Approving Permanent Rates and Denying Petition for Rehearing."[12] The order recognized that Verizon's permanent PAL rates

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[10] *See* Petition, *Petition of the Independent Payphone Association of New York, Inc. to Modify New York Telephone Wholesale Payphone Service Rates and Award Refunds*, Case No. 99-C-1684 (N.Y. PSC filed Dec. 2, 1999) (IPANY Petition, Exh. C).

[11] Reply Comments of IPANY, *Petition of the Independent Payphone Association of New York, Inc. to Modify New York Telephone Wholesale Payphone Service Rates and Award Refunds; Proceeding on Motion of the Commission to Review Regulation of Coin Telephone Services Under Revised Federal Regulations Adopted Pursuant to the Telecommunications Act of 1996*, Case Nos. 99-C-1684, 96-C-1174 (N.Y. PSC filed Mar. 20, 2000) (IPANY Petition, Exh. D).

[12] Order Approving Permanent Rates and Denying Petition for Rehearing, *Petition of the Independent Payphone Association of New York, Inc. to Modify New York Telephone Wholesale Payphone Service Rates and Award Refunds; Proceeding on Motion of the Commission to*

"were left in place" by the PSC's March 31, 1997 order. The PSC rejected IPANY's argument that the *Wisconsin Bureau Order* required the PSC to order Verizon to set its PAL rates at TELRIC, and determined that Verizon's existing PAL rates complied with the new services test under this Commission's precedents. The PSC subsequently denied IPANY's request for rehearing.[13]

4. IPANY then brought an action for judicial review – known as an "Article 78" proceeding – in state court. IPANY sought both prospective and retrospective relief. First, it asked the court to require Verizon to file revised PAL and usage rates that would be "consistent with the FCC's New Services Test as specified in the" *Wisconsin Bureau Order*.[14] Second, it asked the court to require Verizon to refund the difference between those new rates and existing permanent PAL and usage rates back to April 1, 1997.[15] Before the court ruled, the Commission released the *Wisconsin Order*, which established the guidelines that state commissions should use in applying the new services test to payphone services.

Review Regulation of Coin Telephone Services Under Revised Federal Regulations Adopted Pursuant to the Telecommunications Act of 1996, Case Nos. 99-C-1684, 96-C-1174 (N.Y. PSC Oct. 12, 2000) (IPANY Petition, Exh. E).

[13] *See* Order Denying Petition for Rehearing, *Petition of the Independent Paypohone Association of New York, Inc. to Modify New York Telephone Wholesale Payphone Service Rates and Award Refunds; Proceeding on Motion of the Commission to Review Regulation of Coin Telephone Services Under Revised Federal Regulations Adopted Pursuant to the Telecommunications Act of 1996*, Case Nos. 99-C-1684, 96-C-1174 (N.Y. PSC Sept. 21, 2001) (IPANY Petition, Exh. F).

[14] Petition for Review, *Independent Payphone Ass'n of New York, Inc. and Teleplex Coin Communications, Inc. v. Public Serv. Comm'n of the State of New York and Verizon New York Inc.*, Index No. 413-02, RJI No. 01-02-ST2369, at 13 (N.Y. Sup. Ct. filed Jan. 18, 2002).

[15] *See id.*

In July 2002, the New York Supreme Court held that it did not have authority to require Verizon to file new rates.[16] It held that neither the *Wisconsin Bureau Order* nor the *Wisconsin Order* controlled the question whether the PSC's decision – which was reached before the *Wisconsin Order* was released – was correct.[17] However, the supreme court found that the PSC's finding that Verizon's rates complied with the new services test was flawed in one respect because it was based on Verizon's historical, embedded costs, rather than forward-looking costs, which the court held to be inconsistent with then-prevailing federal standards.[18] The court also ordered that, in the event that the PSC determined that lower rates were warranted based on consideration of forward-looking cost, the PSC should determine "what, if any, refunds are required" pursuant to the FCC's April 15, 1997 waiver order.[19]

5. Both Verizon and IPANY appealed the court's decision to the Appellate Division. The court affirmed in part and reversed in part. The court agreed with the trial court that the PSC had not erred by refusing to apply the *Wisconsin Bureau Order*, which, by its terms, "specifically provided that 'this Order only applies to the LECs in Wisconsin specifically identified herein.'" *IPANY*, 774 N.Y.S.2d at 199. The court also held that the *Wisconsin Order*, which had been issued more than a year after the challenged PSC orders, could not be given retroactive effect, because it included "new and substantive changes or additions to the interpretations of the new services test that existed at the time that the Wisconsin order was being reviewed" and thus could not be considered "merely interpretive." *Id.* at 200.

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[16] *See* Decision and Order, *Independent Payphone Ass'n of New York, Inc. v. Public Serv. Comm'n of the State of New York*, Index No. 413-02, RJI No. 01-02-ST2369 (N.Y. Sup. Ct. July 31, 2002) (IPANY Petition, Exh. G).

[17] *See id.* at 17.

[18] *See id.* at 19.

[19] *Id.* at 22.

In any event, the Appellate Division's holdings on these matters ultimately were of only academic importance. As the court noted, IPANY had *already* filed a petition with the PSC requesting reconsideration of Verizon's rates in light of the *Wisconsin Order*, and Verizon had submitted proposed rates and supporting studies.[20] *See id.* at 199 n.1. More important, the court squarely held that, "in the event that the PSC concludes that new rates be established in accordance with the new services test and such rates prove to be lower than those presently in existence," refunds nevertheless could *not* be ordered. *Id.* at 200. The court noted that the claim for refunds had been based exclusively on "a letter from representatives of Verizon's predecessor requesting an extension of time in which to review existing rates and file new rates if it were determined that the existing rates were not compliant with the new services test, proposing an agreement to refund or provide a credit to PSPs for the difference if the newly filed rates were lower than existing rates." *Id.* "Suffice to say that new rates were not filed and the refund order was thus never effective." *Id.* "The fact that the PSC's prior approval of the preexisting rates has now been judicially called into question and the matter has been remanded for further consideration cannot be the basis of potential refunds that were only agreed to and contemplated for a period ending May 19, 1997." *Id.*[21]

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[20] On January 14, 2005, the Administrative Law Judge issued a Procedural Ruling that included a "white paper prepared by advisory staff," which the ALJ indicated might provide "a possible basis for setting new PAL rates without further litigation." Procedural Ruling, *Complaint of Phone Management Enterprises, Inc., and Other Pay Telephone Operators Against Verizon New York, Inc. for Refunds Relating to Unlawful Underlying Payphone Service Rates*, Case Nos. 03-C-0428, 03-C-0519, at 1 (N.Y. PSC Jan. 14, 2005).

[21] IPANY has effectively conceded in the New York proceeding that the question whether the *Wisconsin Order* has retroactive effect is without practical effect, informing the PSC that, "if the Appellate Division holding that no refunds are to be awarded remains in effect . . . then there is a question as to whether determining an appropriate NST rate as of April 15, 1997, would be necessary." Letter from Keith J. Roland, Counsel to IPANY, to Honorable Rafael A. Epstein, New York PSC, Case No. 03-C-0428 (Apr. 28, 2004).

IPANY then sought rehearing, as well as permission to appeal the Appellate Division's decision to the New York Court of Appeals. All such requests were denied. No party sought certiorari from the United States Supreme Court, and the Appellate Division's decision is now final and non-appealable.

DISCUSSION

I. THE BINDING JUDGMENT OF THE NEW YORK STATE COURT BARS IPANY'S PETITION

IPANY's petition seeks a declaration that its members are entitled to refunds of payphone charges paid after April 15, 1997. But the New York court has already rendered a final judgment on that issue. Accordingly, IPANY cannot relitigate it before this Commission.[22]

A. "A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies." *Montana v. United States*, 440 U.S. 147, 153 (1979) (internal quotation marks omitted). "Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Id.* (citations omitted).

Res judicata bars IPANY's claims here. The doctrine of res judicata or claim preclusion provides that, "as to the parties in a litigation and those in privity with them, a judgment on the

[22] IPANY also argues about whether the PSC was required to give the *Wisconsin Order* retroactive effect. That issue, too, has been ruled upon by the New York court and is res judicata. In any event, that issue has no practical importance in this case, as IPANY has conceded elsewhere. *See supra* note 21.

merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action." *Gramatan Home Investors Corp. v. Lopez*, 386 N.E.2d 1328, 1331 (N.Y. 1979). The bar applies to all "matters that could have or should have been raised in a prior proceeding." *Board of Managers v. Horn*, 651 N.Y.S.2d 326, 327 (App. Div. 1996) (citing *Smith v. Russell Sage Coll.*, 429 N.E.2d 746, 749 (N.Y. 1981)). Here, there is no question that IPANY was a party to the earlier litigation; nor can there be any dispute that the New York courts had jurisdiction in the earlier case. Nor is there any dispute that IPANY seeks to pursue precisely the same claim that was rejected by the state court – *i.e.*, for refunds of amounts paid under pre-existing state tariffs. *Compare* IPANY Petition at 4 (asking the Commission to declare that federal law "mandate[s] that Verizon provide refunds to IPPs, back to April 15, 1997, to the extent that Verizon's NST-compliant payphone rates, when finally established, are less than the pre-existing rates") *with IPANY*, 774 N.Y.S.2d at 200 ("request for said refund denied"). As the Supreme Court has said, a "final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. For claim and issue preclusion (res judicata) purposes, in other words, *the judgment of the rendering State gains nationwide force*." *Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 232 (1998) (emphasis added; footnote omitted). The refund claim is dead.[23]

[23] IPANY is also barred from asserting that the PSC erred by failing to apply the *Wisconsin Bureau Order* or that the state court erred by ruling that the *Wisconsin Order* had prospective, not retrospective, effect. These issues were part of IPANY's claim in the Article 78 proceeding, and have been litigated to final judgment.

Collateral estoppel also bars IPANY's petition.[24] The specific legal issues that IPANY seeks to raise here – including whether Verizon agreed to provide refunds of payphone line charges and whether the filed rate doctrine bars IPANY's claim – were actually litigated and necessarily decided by the New York court. *See Smith*, 429 N.E.2d at 749.[25] IPANY may not relitigate that issue here.

B. IPANY's claim that the New York state court's judgment is inconsistent with and "preempted" by federal law does not vitiate the preclusive effect of the state court judgment. IPANY was free to argue (and did in fact argue) that its refund claim (and its additional challenges to the PSC's order) were based on binding federal law. The state court is fully competent to apply and bound to follow federal law. *See Testa v. Katt*, 330 U.S. 386, 393-94 (1947). There is, again, no dispute that the state court had jurisdiction over IPANY's claims. Indeed, it is IPANY that initiated state court review in order to have the state court exercise jurisdiction over its claims. Thus, the state court's judgment that IPANY had no right to a refund under federal law is preclusive. *See Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1243-44 (9th Cir. 2004) ("It is well settled that claim and issue preclusion apply to state court rulings on federal preemption issues."); *Town of Deerfield*, 992 F.2d at 429 (holding that New York court, in Article 78 proceeding, "had the power to decide the preemption issue, for federal courts have not been given exclusive jurisdiction over such questions").[26]

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[24] Collateral estoppel matters in those circumstances where the previous judgment involved a *different* cause of action. IPANY's claim here involves the same cause of action: a declaration by the Commission could be meaningful only to the extent that IPANY could use such a declaration as the basis for pursuing its refund claim.

[25] Likewise, the question of the legal effect of the *Wisconsin Bureau Order* and the *Wisconsin Order* – as relevant to the dispute between IPANY and Verizon – has been finally resolved.

[26] IPANY argues that "it does not matter whether the state determination being reviewed was issued by a Public Service Commission or by a court." IPANY Petition at 36. But the nature of the proceeding and decision *does* matter. There is no doubt that IPANY has already pressed its

C. Finally, it does not matter that the Commission was not a party to the earlier proceeding and that it therefore is not subject to the New York court's judgment. IPANY asks the Commission to act in a quasi-adjudicatory capacity by declaring the IPANY has a right to a refund if the PSC determined that Verizon's rates in effect on April 15, 1997 were not new-services-test-compliant. In that capacity, the agency cannot permit a collateral attack on a prior judgment. *See, e.g., Puerto Rico Maritime Shipping Auth. v. Federal Maritime Comm'n*, 75 F.3d 63, 66 (1st Cir. 1996); *see also NLRB v. Donna-Lee Sportswear Co.*, 836 F.2d 31, 35 (1st Cir. 1987) (NLRB cannot evade effect of prior judgment, even in enforcement action, where dispute was effectively between private parties). As the Federal Circuit has observed, "the same principles of judicial efficiency which justify application of the doctrine of collateral estoppel in judicial proceedings also justify its application in quasi-judicial proceedings." *Graybill v. United States Postal Serv.*, 782 F.2d 1567, 1571 (Fed. Cir. 1986) (citing *Chisholm v. Defense Logistics Agency*, 656 F.2d 42, 46 (3d Cir. 1981)); *cf. Bath Iron Works Corp. v. Director, Office of Workers' Compensation Programs*, 125 F.3d 18, 21 (1st Cir. 1997) (noting that "federal agency is normally bound to respect findings by another agency acting within its competence" and that "the tendency is plainly in favor of applying collateral estoppel in administrative contexts").

To the extent the full faith and credit statute – 28 U.S.C. § 1738 – obligates either the Commission or a reviewing court to grant full faith and credit to the New York state court judgment, the statute, without more, guarantees the judgment preclusive effect. But even if the statute does not apply, there is no basis for denying that state court judgment preclusive effect. We are aware of *no* case in which a private party was permitted to pursue *the same claim* in an administrative adjudication when that claim had already been litigated to final judgment in state

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claims before a tribunal of competent jurisdiction which reached a final judgment on the merits. Such a judgment is conclusive of the parties' rights with regard to this question.

court – that is, where an agency acting in a quasi-judicial capacity denied a state court judgment res judicata effect. Nor is there any reason to deny the state court judgment collateral estoppel effect: there was no restriction on IPANY's ability to present all of its federal law arguments to the state court, which considered and ruled on them. There is no fact or evidence that IPANY was prevented from presenting in that forum. And there is no significant prospective enforcement interest, because Verizon has already filed new rates that the PSC is reviewing under the standards established in the *Wisconsin Order*.

The Second Circuit's decision in *Town of Deerfield* illustrates the impropriety of the relief that IPANY seeks here. In that case, a homeowner challenged a town ordinance prohibiting the installation of a satellite dish on any lot smaller than one-half acre, arguing that it was preempted by an FCC regulation. *See* 992 F.2d at 422. His challenge – which, like IPANY's, was pursued through an Article 78 proceeding in New York state court – was rejected by the state court, which determined, *inter alia*, that the ordinance was not preempted. *See id.* at 425. The homeowner then brought a suit against the town under 42 U.S.C. § 1983; the district court held that the claim was foreclosed by principles of collateral estoppel. *See id.* The FCC then ruled that the ordinance *was* preempted, and held that application of collateral estoppel would result in unfairness because the FCC had required the homeowner to exhaust all judicial remedies before applying to the FCC. *See id.* at 425-26.

The Second Circuit reversed. The court noted that the district court had rightly determined that it was "required by 28 U.S.C. § 1738 to accord the [state court] judgment . . . preclusive effect." *Id.* at 429. The FCC was, in turn, required to "recognize the conclusive effect of the judgment" of the federal district court "with respect to any issue of the preemptive effect" of the FCC's regulation. *Id.*

While *Town of Deerfield* dealt directly with the conclusive effect of the federal district court's judgment in the later FCC proceeding, its conclusion – that the FCC could not "arrogate to itself the power to (a) review or (b) ignore the judgments of the courts," *id.* at 430 – applies *a fortiori* here. IPANY's right to a refund has been conclusively determined by the New York court. If the FCC were to declare, notwithstanding the New York judgment, that IPANY could be entitled to a refund under certain circumstances, that statement could not resuscitate IPANY's claim. No court – state or federal – could decline to enforce the prior judgment of the New York court, and any statement the FCC made here would thus be without any legal effect.

D. As the foregoing discussion demonstrates, any decision by this Commission that denied the New York court's judgment preclusive effect would be contrary to law. In any event, such a determination would also be inconsistent with this Commission's own practice: the decision that led to the Second Circuit's reversal in *Town of Deerfield* aside, this Commission ordinarily does afford preclusive effect to the judgments of state courts acting within their jurisdiction. For example, in Memorandum Opinion and Order, *Cheyenne River Sioux Tribe Telephone Authority and US WEST Communications, Inc.; Joint Petition for Expedited Ruling Preempting South Dakota Law*, 17 FCC Rcd 16916 (2002), while the Commission agreed to hear a preemption claim that the South Dakota state court had held to be within "the exclusive jurisdiction of the Federal Communications Commission" and thus had not decided, it refused to hear a claim that the South Dakota law was preempted by federal law on tribal sovereignty because "[t]he South Dakota Supreme Court has already rejected Petitioners' preemption claim with respect to these statutes and federal policies and we see no basis for the Commission to re-litigate these issues." *Id.* at 16926, ¶ 19, 16932-33, ¶ 36. Likewise, in its Memorandum Opinion and Order, *Broadview Networks, Inc. v. Verizon Telephone Companies and Verizon New York,*

Inc., File No. EB-03-MD-021, DA 04-3569 (Enf. Bur. rel. Nov. 10, 2004), the Commission "deferr[ed]" to the conclusions of the New York Supreme Court that the complainant was required to arbitrate its claims because the court had jurisdiction and because "Broadview had an ample opportunity to make its arguments before the New York court." *Id.* ¶¶ 14-15.

Neither of the prior Commission decisions that IPANY relies on is to the contrary. In the Memorandum Opinion and Order, *New England Public Communications Council Petition for Preemption*, 11 FCC Rcd 19713 (1996), the New England Public Communications Council ("NEPCC") filed a petition to preempt the Connecticut DPUC's legislative rule banning independent payphone providers. No issue of res judicata was presented because the NEPCC had never pursued its claim before. And, in its Order, *North Carolina Payphone Association Petition for Declaratory Ruling*, 17 FCC Rcd 4275 (CCB 2002), the Common Carrier Bureau simply stated that the North Carolina Utilities Commission and the Michigan PSC should "re-evaluate their respective decisions concerning the pricing of BOCs' intrastate payphone line rates," *id.* at 4276, ¶ 3, a holding that did not conflict with any prior state court judgment. Again, there was no issue of res judicata addressed in the Bureau's order.

II. THE MERITS OF A PARTICULAR STATE COMMISSION'S RESOLUTION OF AN INDIVIDUAL COMPLAINT IS NOT AN APPROPRIATE SUBJECT FOR A DECLARATORY RULING

We have already explained in our prior comments on the IPTA and SPCA petitions that the Commission has "broad discretion" in deciding whether to issue a declaratory ruling, and that the exercise of that discretion to review individual state commission orders regarding payphone access line rates would be inappropriate. We will not repeat those arguments here, but they provide additional reasons to deny IPANY's petition. *See* Exhs. A-C hereto; *see also supra* note 1.

III. IPANY IS WRONG ON THE MERITS OF ITS CLAIMS

In all events, IPANY's claims are without merit. IPANY seeks to raise two sets of issues. First, it argues that the Appellate Division erred by denying its request for refunds of the difference between rates set in accordance with the new services test and the rates that were in effect after April 15, 1997. Second, it argues that the PSC erred by declining to follow the *Wisconsin Bureau Order*; and it likewise claims that the New York courts erred by refusing to give the *Wisconsin Order* retroactive effect. Its arguments are wrong and provide no basis for relief.

A. The state court's determination that Verizon could not be liable for refunds was correct. First of all, and contrary to IPANY's arguments, *see* IPANY Petition at 32-33, there is no doubt that refunds of permanent rates are not permitted under New York law and the filed rate doctrine. *See supra* p. 4 (citing *Purcell*, 197 N.E. at 183; *Concord Assocs.*, 754 N.Y.S.2d at 95). Nor would they be permitted under federal filed rate principles. *See Arizona Grocery Co. v. Atchison, T. & S.F. Ry.*, 284 U.S. 370 (1932); *BP West Coast Prods., LLC v. FERC*, 374 F.3d 1263, 1304 (D.C. Cir. 2004) ("*Arizona Grocery* proscribes 'the retroactive revision of established rates through ex post reparations.'") (quoting *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1107 (D.C. Cir. 2001)). IPANY did not even challenge that conclusion before the New York courts, conceding that state law would not permit such refunds.

Instead, IPANY relied exclusively on Verizon's supposed voluntary commitment as the basis for its claim for refunds. As we have already explained, however, the court properly rejected that argument. Verizon and other ILECs agreed, in exchange for a limited waiver extending the time to file tariff revisions, to make any rate reductions effected by those new tariffs (which had to be filed by May 19, 1997) effective on April 15, 1997. Thus, Verizon's

commitment did not support refunds in this case because (1) Verizon did not avail itself of the extension with regard to PAL and usage rates, and (2) the voluntary commitment covered only the period of the extension – until May 19, 1997 – in any event.[27]

B. The second set of issues that IPANY attempts to raise – which involve what standard the PSC and the New York court should have applied in reviewing rates *prior* to the release of the *Wisconsin Order* – is without practical significance. The PSC is, in any event, limited to granting prospective relief, and there is no dispute that, in setting Verizon's new PAL and usage rates, the PSC must apply the principles set forth in the *Wisconsin Order*. There is already a proceeding underway for that purpose. Thus, the standards that the PSC should have applied in 2000 have no concrete importance. Again, IPANY has effectively conceded as much before the PSC. *See supra* note 21. Furthermore, the court's determination that no refunds were permitted was not based on its understanding of what version of the new services test applied, but, as noted above, on the court's correct understanding of Verizon's voluntary commitments as well as the limitations imposed by state filed rate principles.

CONCLUSION

The Commission should deny IPANY's petition.

[27] Indeed, IPANY never raised any claim for refunds at all until December 1999 – long after it had filed comments seeking to have Verizon's PAL rates "repriced."

Respectfully submitted,

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